princes, or people, of what nation, condition or quality soever, barratry of the Master and Mariners, and all other perils, losses and misfortunes, that have or shall come to the hurt, detriment or damage of the said goods and merchandises, or any part thereof. And in case of any loss or misfortune, it shall be lawful and necessary to and for the assured, his or their factors, servants and assigns, to sue, labor and travel for, in and about the defense, safeguard and recovery of the said goods and merchandises, or any part thereof, without prejudice to this insurance; nor shall the acts of the insured or insurers, in recovering, saving and preserving the property insured, in case of disaster, be considered a waiver or an acceptance of an abandonment; to the charges whereof, the said Universal Insurance Company will contribute according to the rate and quantity of the sum herein insured; having been paid the consideration for this insurance by the assured or his or their assigns, at and after the rate of ..... As Agreed .....

And in case of loss, such loss to be paid in thirty days after proof of loss, and proof of interest in the property hereby insured (the amount of premiums, if unpaid, being first deducted), but no partial loss or particular average shall in any case be paid, unless amounting to five per cent. Provided a-ways, and it is hereby further agreed, that if the said assured shall have made any other insurance upon the interest aforesaid, prior in day of date to this Policy, then the said Universal Insurance Company shall be answerable only for so much as the amount of such prior insurance may be deficient towards fully covering the interest hereby insured; and the said Universal Insurance Company shall return the premium upon so much of the sum by them insured as they shall be exonerated from, by such prior insurance. And in case the assured shall have made any insurance (other than fire) upon the said interest, subsequent in day of date to this Policy, the said Universal Insurance Company shall nevertheless be answerable for the full extent of the sum by them subscribed hereto, without right to claim contribution from such subsequent assurers, and shall accordingly be entitled [fol. 7] to retain the premium by them received, in the same manner, as if no such subsequent insurance had been made. And in case the assured shall have made any insurance (other than fire) upon the interest aforesaid of date the same day as this Policy it shall be deemed simultaneous

herewith, and the said Universal Insurance Company shall not be liable for more than a ratable contribution in the proportion of the sum by them insured to the aggregate of such simultaneous insurance. It Is Also Agreed, that the property be warranted by the assured free from any charge, damage or loss, which may arise in consequence of a seizure or detention, for or on account of any illicit or prohibited trade, or any trade in articles contraband of war. "It is also agreed that if any goods, etc., lost or damaged be shipped under an Insured Bill of Lading, or if the rate of freight thereon includes insurance, or in case any agreement be made or accepted, by the assured with any carrier or bailee by which it is stipulated that such or any carrier or bailee shall have, in case of any loss for which any carrier or bailee (or their underwriter) may be liable, the benefit of any insurance effected by the assured, then and in that event this policy shall be void as regards any liability for such loss hereunder, but this Company in these and all cases of loss or damage by perils insured against shall be liable and owe actual payment for (only) what cannot (and could not in the absence of this insurance) be collected from carriers and/or bailees of property lost or damaged, and/or their insurers, and also shall be chargeable with the direct pecuniary loss to the assured temporarily arising from delay in collection from said carriers and or bailees and/or insurers; and the advancing (for the purpose only of avoiding such pecuniary loss) of funds to the assured for his protection pending such delay, shall in no case be considered as affecting the question of the final liability of this Company, and as soon as collection is made from carriers and/or bailees and/or insurers, the assured shall retain only such proportion of the sum or sums so advanced by this Company as will, with the amount collected from carriers and/or bailees and/or insurers, make up the sum of the assured's loss, and the balance, of such sum or sums as may have been advanced by this Company shall thereupon be paid back to this Company; but if no such collection can be made from carriers and/or bailees and/or insurers; the assured shall [fol. 8] retain so much of said sum or sums which may have been advanced by this Company as shall not exceed the actual liability of this Company thereby established (provided always, the loss shall constitute in other respects a claim under this insurance)."

It is Warranted by the assured or those acting in their behalf that there shall be no waiver, transfer or any action tending to defeat or decrease any claim against the carrier or other person or persons whether before or after the insurance is effected under this policy.

It is Warranted not to abandon in case of capture, seizure, or detention, until after condemnation of the property insured; nor until ninety days after notice of said condemnation is given to the Universal Insurance Company. It is also warranted not to abandon in case of blockade, and free from any expense in consequence of capture, seizure, detention or blockade, but in the event of blockade, to be at liberty to proceed to an open port and there end the voyage.

Memorandum.—It is also agreed that bar, bundle, rod, hoop and sheet iron, wire of all kinds, tin plates, steel, madder, sumac, wickerware and willow (manufactured or otherwise), salt, grain of all kinds, tobacco, Indian meal, fruits (whether preserved or otherwise), cheese, dry fish, hay, vegetables and roots, rags, hempen yarn, bags, cotton bagging and other articles used for bags and bagging, pleasure carriages, household furniture, skins and hides, musical instruments, looking glasses, and all other articles that are perishable in their own nature, are warranted by the assured free from average, unless general; hemp, tobacco stems, matting and cassia, except in boxes, free from average under twenty per cent, unless general; and sugar, flax, flax-seed and bread, are warranted by the assured free from average under seven per cent, unless general; and coffee in bags or bulk, pepper in bags or bulk, and rice, free from average under ten per cent, unless general.

It is Warranted by the assured, free from damage or injury from dampness, change of flavor or being spotted, discolored, musty or moldy, except caused by actual contact of [fol. 9] sea water with the articles damaged, occasioned by sea perils. In case of partial loss by sea damage to dry goods, cutlery or other hardware, and on shipments from ports and places East of the Cape of Good Hope, on gunny cloth, gunny bags or hides, the loss shall be ascertained by a separation and sale of the portion only of the contents of the packages so damaged, and not otherwise; and the same practice shall obtain as to all other merchandise, so far as practicable. Not liable for leakage on molasses or other liquids, nor for breakage, unless occasioned by stranding

or collision with another vessel. And it is also agreed that in case of loss or damage to any part of a machine, consisting, when complete for sale or use, of several parts, the Universal Insurance Company shall only be liable for the insured value of the part lost or damaged.

It is especially agreed that when, by its terms, this insurance includes risk while on railroad and/or dock, wharf, quay, or elsewhere on shore, this company is only to be liable for loss or damage by fire, collision or derailment, while on railroad, and only by fire or flood (meaning rising, navigable waters), when elsewhere on shore unless otherwise provided for herein.

All risks insured as under-deck unless otherwise specified in this Policy.

Cargo on deck free from claim for loss by wet, breakage, leakage or exposure.

In case of damage from perils insured against, affecting labels only, loss to be limited to an amount sufficient to pay the cost of new labels and relabeling the goods, provided same amounts to a claim under the terms of the Policy.

This Company is not liable for any loss, damage or expense in consequence of sweat, or heating of the vessel's hold.

It is Warranted by the assured, that vessels to be loaded with grain from the ports of New York, Boston, Philadelphia, Baltimore, or San Francisco for Foreign Ports, are to be loaded under the inspection of the Surveyor of the Board of Underwriters, or of a Surveyor appointed by the Uni- [fol. 10] versal Insurance Company, and his certificate as to their proper loading and seaworthiness obtained, or the insurance under this Policy to be void.

No suit or action on this Policy for the recovery of any claim, shall be sustainable in any Court of law or equity unless the insured shall have fully complied with the terms and conditions of this Policy, nor unless commenced within twelve (12) months next after the happening of the loss, provided that where such limitation of time is prohibited by the laws of the State wherein this policy is issued, then and in that event no suit or action under this Policy shall be sustainable unless commenced within the shortest limitation permitted under the laws of such State.

This insurance not to attach or be liable for more than $..... form ..... by any one vessel

at any one time, unless otherwise agreed upon at time of endorsement. Risks applicable hereto to be reported as soon as known to assured.

Proof of loss to be authenticated by the Agent of the Universal Insurance Company, if there be one at the place where such proofs are taken; otherwise by the Correspondent of the Board of Underwriters of New York if there be one, otherwise by Lloyds Agent.

If the voyage aforesaid shall have been begun and shall have terminated before the date of this Policy, then there shall be no return of premium on account of such termination of the voyage.

Either party at liberty to cancel upon giving ..... form ..... written notice to that effect, but without prejudice to any risk, pending at the termination of that period.

In Witness Whereof, the said Universal Insurance Company has caused this Policy to be signed by its President and attested by its Secretary, at its office in the City of Newark, and State of New Jersey, and this Policy is made and accepted upon the above expressed conditions, but shall [fol. 11] not be valid unless countersigned by Talbot, Bird & Co., Inc., General Managers of the Company.

Samuel Bird, President. John F. Byrne, Secretary.

Countersigned at New York, N. Y., this 23rd day of June A. D. 1933.

Universal Insurance Company; Talbot, Bird & Co., Inc., General Managers. James J. Manton, Atty.

It is warranted by the assured; free from claim on account of capture, seizure, arrest, restraint, and/or detainment, or for loss, damage, destruction or expense, which may be attributed to or arise from the act of any person or persons acting or claiming to act under authority from any country or people, whether before or after declaration of war; and free from the consequences thereof or any attempt thereat.

Free from any claim for loss, damage, destruction or expense in consequence of hostilities and/or warlike operations, revolutions, internal commotion, civil commotion, insurrection, riots, and acts of strikers, locked-out workmen or persons taking part in labor disturbances.

Warranted free of any claim based upon loss of or frustration of, the insured voyage, or adventure, caused by arrests, restraints or detainments of kings, princes, or peoples.

Lanasa Fruit Importing Company, Inc. and/or as Agents

For account of whom it may concern:

Loss, if any payable to Assured or order.

[fol. 12] On merchandise consisting principally of Fruit (Including Cocoanuts).

Special conditions Under Deck: Warranted free from particular average unless the vessel or craft be stranded, sunk, burnt, but the Assurers are to pay the insured value of any package or packages which may be totally lost in loading tran-shipment or discharge, also any loss of or damage to the interest insured which may reasonably be attributed to fire, collision or contact of the vessel and/or craft and/or conveyances with any external substance (ice included) other than water, or to discharge of cargo at a port of distress, also to pay landing, warehousing, forwarding and special charges, if incurred.

(Imports) to cover all shipments consigned to assured or to others for their account or control or in which they have an interest, to the extent of that interest, also to cover all shipments, which they may have instructions to insure, providing such instructions are given in writing prior to sailing of vessel and before any known or reported loss or accident; excluding such shipments as are insured by shipper, and so advised in writing prior to sailing of vessel and before any known or reported loss or accident.

(Exports) to cover all shipments made by assured or by others for their account or control or in which they have an interest, to the extent of that interest, also all shipments in respect to which they have received instructions to insure, excluding such shipments as the assured are instructed not to insure, such instructions in either or both cases being given in writing prior to sailing of vessel and before any known or reported loss or accident.

Valued at premium included at invoice value (foreign currency in invoice to be converted into United States Dollars at Federal Reserve rate of exchange prevailing on date of sailing of Steamer) plus charges incurred up to time of completion of loading into ship, commissions, prepaid and/or

advanced and/or guaranteed freight and/or charter hire, if any, and 75% added thereto.

[fol. 13] Per iron and/or steel steamer and/or steamers, motor ships, excluding sailing vessels with or without auxiliary engines, and connecting conveyances.

At and from ports and/or interior places in the West Indies to ports and/or interior places in the United States, direct or otherwise, including risk of tran-shipment, if any, and lighterage whether customary or otherwise.

To attach and cover on all goods shipped on and after June 21st, 1933. Policy to be continuous until cancelled by either party giving the other 30 days notice in writing, such cancelment, however, not to prejudice any risk then pending.

To attach and cover, if at the risk of the assured, from the moment the merchandise leaves store, warehouse or factory at port or place of shipment (whether at interior or at seaboard) and to cover continuously thereafter, while in due course of transit, until safely delivered at store, warehouse or factory at port or place of final destination, including inland transportation and while on docks, wharves, quays and while in Appraisors' stores and/or Custom House for examination; but not to cover in any other store or warehouse.

On Shipments to River Plate ports the risk of fire under this Policy shall cease upon arrival at any shed (transit or otherwise), store, custom house, warehouse, or upon the expiry of ten days subsequent to landing, whichever may first occur.

It is hereby understood and agreed that shipments to Japan are covered subject to the following clause:

Notwithstanding anything to the contrary contained herein the risk under this insurance shall cease fifteen (15) days after arrival of the goods at or in Customs compound or other premises used for Customs purposes, but in no event shall this insurance cover either after arrival of the goods at premises used by the consignee or other party of interest, or their agents, for storage purposes, or for more than twenty (20) days after discharge from ocean steamer, whichever may first occur.

[fol. 14] In the event that a longer period of protection than that specified in the preceding clause be required at time of shipment an additional premium to be named at time of shipment shall be charged for each 15 days (or part

thereof) granted in excess of the periods named in the preceding clause.

Goods insured hereunder by land conveyances are covered against loss or damage caused by fire, collision, and derailment, and while on docks or elsewhere on shore, against the risks of collapse and/or subsidence of docks, wharves, quays, also fire, floods (meaning the rising of navigable waters); unless otherwise provided for herein.

Shipments on deck to be insured: Free of Particular Average unless caused by the vessel being stranded, sunk, burnt, on fire, or in collision, but including jettison and/or washing overboard, irrespective of percentage.

Held covered at a premium to be arranged in case of deviation or change of voyage or of any omission or error in the description of the interest, vessel or voyage, provided same be communicated to the assurers as soon as known to the assured.

Including all liberties as per contract of affreightment. The assured are not to be prejudiced by the presence of the negligence and/or latent defect clause in the Bills of Lading and/or Charter Party.

The risks covered by this policy are to include loss, damage or expense resulting from explosion, howsoever or wheresoever occurring, provided same is shown not to have been caused by or attributable to any of the risks excluded by the terms of the F. C. & S., or S. R. & C. C. Clause.

Including risks of craft to and from the vessel each lighter, craft or conveyance, to be considered as if separately insured, and to pay for total loss of any package or packages, whilst loading, transshipping or discharging. Also to cover any special or supplementary lighterage to take the goods [fol. 15] to or from the warehouse. The assured are not to be prejudiced by any agreement exempting lightermen from liability.

General average and salvage charges payable according to Foreign Statement or according to York-Antwerp Rules, if in accordance with the Contract of affreightment.

Seaworthiness of vessel as between the Assured and Assurers is hereby admitted.

It is warranted by the assured to report all Export shipments hereunder to Messrs. J. Ramsay Barry & Co., Baltimore, Md., for transmission to Talbot, Bird & Company, Inc., 51 Beaver Street, New York City, within forty eight

(48) hours after sailing of vessel (Sundays and Holidays excepted) or as soon thereafter as may be practicable.

It is warranted by the assured to report all Import shipments hereunder to Messrs. J. Ramsay Barry & Co., Baltimore, Md., for transmission to Talbot, Bird & Company, Inc., 51 Beaver Street, New York City, as soon as practicable after they have knowledge thereof.

Held covered in the event of the goods (or any part thereof) hereby insured, being shut out and/or transferred to another vessel or vessels. In the event of the goods or any part thereof being carried on or beyond the port of destination, the assurers hereby agree to hold the assured covered until final arrival and delivery of the goods at their proper port of destination and delivery as herein provided. Notice to be given this Company as soon as known to the assured.

This company shall not be liable for more than Thirty Five Thousand ($35,000) Dollars by any one vessel or conveyance or in any one place at any one time, unless otherwise agreed upon, in respect to shipments on deck it is understood and agreed that this Company shall not be liable for more than Five Thousand ($5,000) Dollars.

Rates as per schedule attached. Premiums payable monthly in cash.

[fol. 16] Attached to and forming part of Policy No. 12872 of the Universal Insurance Company.

Universal Insurance Company; Talbot, Bird & Co., Inc., General Managers. James J. Manton, Atty.

New York, April 23, 1934.

Endorsement to be attached to and made part of Policy No. 12872 of the Universal Insurance Company, Newark, N. J., issued to Lanasa Fruit Importing Co., Inc., on the

It is hereby understood and agreed that on and after April 20, 1934, interest in this policy is vested in Lanasa Fruit Steamship and Importing Company, Inc.

Talbot, Bird & Co., Inc., (Sgd.) James J. Manton.

All other terms and conditions of the policy remaining unchanged.

Baltimore, Maryland, July 30, 1935.

Universal Insurance Company, a Body Corporate,

Dr. to

Lanasa Fruit Steamship & Importing Co., Inc.

To loss on 28,587 bunches of bananas ex S. S. Smaragd, July 21, 1935	$11,559.43
Plus 75% as per policy	8,669.57
Total amount of loss	$20,229.00

[fol. 17] IN UNITED STATES DISTRICT COURT, DISTRICT OF MARYLAND

PLEAS TO DECLARATION—Filed January 3, 1936

The defendant, Universal Insurance Company, by Ritchie, Janney, Ober & Williams, its attorneys, for pleas to the plaintiff's declaration and to each and every count thereof says:

1. That it never promised as alleged.

2. And for a second plea, that it never was indebted as alleged.

3. And for a third plea, that on or about April 4, 1934, in consideration of an increased premium, its policy of insurance referred to in the plaintiff's declaration was extended by indorsement at the request of the plaintiff to cover loss by decay, injury or damage to fruit in consequence of delay resulting from standing. Said indorsement was in the form annexed hereto marked "Exhibit A", and made a part hereof as fully as if set forth at length herein. And that on or about January 16, 1935, and before the stranding alleged in the declaration, the coverage against damage in consequence of delay granted by said indorsement dated April 4, 1934, was cancelled by indorsement dated January 25, 1935, which provided—

"It is hereby understood and agreed that indorsement attached to this policy dated April 4, 1934, is cancelled in respect of shipments made on and after January 16, 1935 and thereafter this policy covers the same as prior

to the attachment of that indorsement, and the rate is reduced from 60¢ to 25¢."

4. And for a fourth plea, that said policy of insurance referred to in the plaintiff's declaration contained and was issued subject to the following express warranty.

"It is warranted by the assured, free from damage or injury from dampness, change of flavor or being spotted, discolored, musty or mouldy, except caused by actual con-
[fol. 18] tact of sea water with the articles damaged, occasioned by sea perils."

And that the loss and damage alleged in the plaintiff's declaration consisted of damage from the bananas being spotted, discolored, musty or mouldy, and that said damage was not caused by contact of sea water with the bananas.

Ritchie, Janney, Ober & Williams, Attorneys for Defendant.

STATE OF NEW YORK,
County of New York, ss:

I hereby certify, that on this 30th day of December, 1935, before me, the subscriber, a Notary Public of the State of New York, in and for the County of New York, personally appeared Harry Bird, Vice-President of Universal Insurance Company, the defendant in the above entitled cause, and on behalf of said defendant corporation made oath in due form of law that every one of the foregoing pleas pleaded by said defendant corporation is true; and further that the said defendant corporation does not admit nor does he as vice-president thereof admit any part of the plaintiff's demand to be due or owing, but that he and said defendant corporation dispute the whole of said amount. And further, that he, the affiant, verily believes that the defendant, corporation will be able at the trial of the cause, to produce evidence to support the said pleas as to the whole of the plaintiff's said demand so disputed, and that he is advised by counsel and that the said defendant corporation is also advised by counsel, to file the said pleas.

Harry Bird.

Subscribed and sworn to before me this 30th day of December, 1935. Charles Rosebrock, Notary Public. (Notary's Seal.)

[fol. 19] I, Frank B. Ober, a member of the firm of Ritchie, Janney, Ober & Williams, hereby certify that I advised Harry Bird, Vice President of Universal Insurance Company, defendant in the above entitled cause, and also advised said Universal Insurance Company to file the foregoing pleas and that I advised said Harry Bird, Vice-President, of said defendant company, to make the aforegoing affidavit.

Frank B. Ober.

EXHIBIT "A" TO PLEAS

April 4th, 1934.

Endorsement to be attached to and made part of Policy No. 12872 of the Universal Insurance Company of Newark, N. J., issued to Lanasa Fruit Importing Company Inc.

It is hereby understood and agreed that effective as to all shipments made on and after date this policy is amended to cover as follows:

Free of particular average unless the vessel be stranded, sunk, burned, on fire or in collision, in any, all or several of which events the insurers are liable for such loss by decay, injury or damage to the fruit as is occasioned thereby or occurs during or in consequence of delay resulting therefrom. Insurers are liable also for such loss in consequence of delay resulting from any, all or several of the following causes; i. e. breakage of shaft, loss of blades from propeller, derangement or breakage of machinery, derangement or breakage of rudder and/or sternpost, whether or not the vessel be stranded, sunk, burned, or in collision, provided that in all cases the loss amounts to 10% after deducting 5% for ordinary loss.

The foregoing conditions shall apply to the vessel carrying or due to carry the cargo insured hereunder.

It is further understood and agreed that the risks insured by this policy shall attach from the time the mer-[fol. 20] chandise and/or goods becomes at risk of the assured in interior (but in no event to cover uncut fruit), it being understood and agreed that in the event of stranding, sinking, burning or collision of the vessel, breakage of machinery, derangement or breakage of rudder and/or sternpost (whether or not vessel be stranded, sunk, burned on fire or in collision) prior to arrival at port of shipment

and/or previous to loading of cargo, insurance attaches only on such interest at risk not exceeding fifty (50) hours prior to due loading date.

Insurance to cover continuously thereafter in due course of transit subject to the full terms of the policy until discharged at final port of destination but including risks of craft and/or lighter to and from the vessel. Each craft and/or lighter to be deemed a separate insurance.

All other terms and conditions remaining unchanged.

Talbot, Bird & Co., Inc.

IN UNITED STATES DISTRICT COURT

JOINDER OF ISSUE ON FIRST AND SECOND PLEAS OF DEFENDANT AND DEMURRER TO THIRD AND FOURTH PLEAS—Filed January 7, 1936

The plaintiff, Lanasa Fruit Steamship and Importing Company, Inc., a body corporate, by George Forbes and Henry L. Wortche, its attorneys, joins issue on the first and second pleas of the defendant, and demurs to the third and fourth pleas for the following reasons:

1. That the third and fourth pleas of the defendant are bad in substance and insufficient in law.

2. That the said third and fourth pleas of the defendant amount to the general issue plea.

3. That the third plea of the defendant sets fourth no pleadable defense to the action of the plaintiff herein.

[fol. 21] 4. That the third plea of the defendant pleads as a defense a matter not a part of the contract sued on, as will be seen from the face of the plea.

5. That the fourth plea of the defendant does not negative other sea perils, and particularly stranding, as set forth in the plaintiff's declaration.

6. That the defense under the fourth plea, if sound, can be raised under the general issue plea.

7. And for other causes to be shown at the hearing.

George Forbes, Henry L. Wortche, Attorneys for Plaintiff.

IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

At Law. #5801

LANASA FRUIT STEAMSHIP & IMPORTING COMPANY, INC.,

vs.

UNIVERSAL INSURANCE COMPANY

Baltimore, Maryland, June 12, 1936.

Hearing on Demurrer to Third and Fourth Pleas, Before Judge William C. Coleman

Appearances:

Messrs. George Forbes and Henry L. Wortche, on behalf of plaintiff.

Messrs. Ritchie, Janney, Ober & Williams (by Mr. Frank B. Ober and Mr. Southgate L. Morison), on behalf of defendant.

[fol. 22] OPINION (Oral)—June 12, 1936

COLEMAN, District Judge:

The question presented involves the interpretation of a policy of marine insurance issued by the defendant to the plaintiff covering a cargo of bananas shipped aboard the Norwegian Steamship Smaragd in July, 1935, from Cuba to Baltimore. The vessel was stranded coming up Chesapeake Bay, and before she could be floated, the entire cargo of bananas became overripe and rotted, resulting in total loss. The plaintiff furnished the requisite proof of loss but defendant has refused to pay on the ground that the direct cause of the damage to the cargo was the delay resulting in the stranding, and that such is not covered by the policy in suit.

The defendant has filed general issue pleas and two special pleas, the first setting up a rider on the policy which, however was cancelled prior to the stranding, under the terms of which the policy was made expressly to cover damage in consequence of delay due to stranding and various other causes. The second special plea set up a

warranty contained in the policy exonerating the defendant from liability from certain damage referred to in the warranty. The plaintiff has joined issue on the general issue pleas and has demurred to the special pleas. A hearing has been had on the demurrer, the principal grounds of which are set forth in the course of this opinion.

I reach the conclusion that the demurrer must be overruled in this case because I think the first special plea is good. I find it unnecessary to rest this case on any other ground than that the rider, which was in the policy originally, but was struck out prior to the stranding which is the cause of the present controversy, is the best and, I think, conclusive evidence of the interpretation which must be given to the other clauses of the policy, to wit, an interpretation in favor of the defendant.

Because of this view which I take of the case, it becomes unnecessary for me to go into any lengthy analysis or consideration of differences, if such there be, between the [fol. 23] British and American authorities. I will say, parenthetically, however, that it seems to me to be very clearly established that unless such liability is expressly assumed in a policy of this kind, an insurance company is not liable for loss due to the inherent nature of the goods, or to delay; and, as I think the defendant has properly stated, this principle is applicable where perishable goods have wholly or partially deteriorated through delay in the voyage, even though such delay was directly caused by the perils of the sea. I believe that to be not only the weight of the English authorities, but to be consistent with such American authorities as there are with the possible exception of the Corsicana case, (Brandyce vs. United States Lloyd's Inc., 1924 A. M. C. 365; 203 N. Y. Supp. 10; 239 N. Y. 573). See Taylor vs. Dunbar L. R. 4 C. P. 206; Pink vs. Fleming, L. R. 25, Q. B. D. 396; Perry vs. Cobb, 88 Me. 435.

But, as I have just stated, I do not think it is necessary for me to attempt to determine whether the decision in the Corsicana case is directly contrary to the weight of authority either in England or in this country, because I rest the present case on the narrower ground just indicated.

The rider which was struck out, unquestionably covered delays due to stranding, by the following language:

"It is hereby understood and agreed that effective as to all shipments made on and after date this policy is amended to cover as follows:

Free of particular average unless the vessel be *stranded,* sunk, burned, on fire or in collision, *in any, all or several of which events the insurers are liable for such loss by decay, injury or damage to the fruit as is occasioned thereby or occurs during or in consequence of delay resulting therefrom.* Insurers are liable also for such loss in consequence of delay resulting from any, all or several of the following causes; i. e. breakage of shaft, loss of blades from propeller, derangement or breakage of machinery, derangement or breakage of rudder and/or sternpost, whether or not the vessel be stranded, sunk, burned, or in collision, provided that in all cases the loss amounts to 10% after deducting [fol. 24] 5% for ordinary loss. The foregoing conditions shall apply to the vessel carrying or due to carry the cargo insured hereunder." (Italics inserted.)

It is true that this rider recites liability for damage directly due to some disasters, such as fire, which direct damage is covered by the clause in the policy hereinafter quoted upon which plaintiff relies, but the reference to damage which is occasioned or occurs "during or in consequence of delay resulting therefrom" as thus expressly provided for in the rider, is not referred to in any part of the policy in force at the time of the stranding. Therefore, to say that without this rider the policy nevertheless covers what this rider expressly covered, and for which coverage a higher premium was charged, is an argument which is not convincing. The language of the policy upon which the plaintiff relies is the following:

"Touching the adventure and *perils* which the said Universal Insurance Company is contended to bear, and take upon itself, in this voyage, *they are of the seas,* men-of-war, fires, enemies, pirates, rovers, assailing thieves, jettisons, letters of mart and countermart, reprisals, takings at sea, arrests, restraints and detainments of all kings, princes, or people, of what nation, condition or quality, soever, barratry of the Master and Mariners, *and all other perils, losses and misfortunes, that have or shall come to the hurt, detriment or damage of the said goods and merchandises, or any part thereof.* And in case of any loss or misfortune, it shall be lawful and necessary to and for the assured, his or their factors, servants and assigns, to sue, labor and travel for, in and about the defense, safeguard

and recovery of the said goods and merchandises, or any part thereof, without prejudice to this insurance; nor shall the acts of the insured or insurers, in recovering, saving and preserving the property insured, in case of disaster, be considered a waiver or an acceptance of an abandonment; to the charges whereof, the said Universal Insurance Company will contribute according to the rate and quantity of the sum herein insured; having been paid the consideration for this insurance by the assured or his or their assigns, at and after the rate of as agreed." (Italics inserted.)

I do not think that, in the light of the authorities to which [fol. 25] I have referred, it is correct to say that "the perils" of the sea above referred to, cover or were intended to cover a situation such as is here presented, while I am satisfied that one of the very purposes of the rider was to include such a situation, because not otherwise included. In short, I do not think that the broad language of the initial paragraph of the main policy, which has just been referred to, is broad enough, standing by itself, to include liability on the part of the insurance company for delay due to stranding. Tempest and collision are just as much "a sea peril" as is stranding. None of these is specifically referred to in the clause of the policy just quoted. Indirect damage due to tempest and collision delay is not recoverable under such a clause. See Taylor vs. Dunbar, Pink vs. Fleming and Perry vs. Cobb, supra. Therefore, when, as here, "the sea peril", to wit, the stranding, was no more the proximate cause of the damage to the goods, but only the antecedent cause of the delay, there can be no recovery, at least according to the weight of English authority.

A word only is sufficient with respect to the other clause upon which defendant relies by its second special plea. I think that has no application whatsoever to the present case, because, as I interpret it, it relates only to situations where there has been some ingress of water into the vessel, and the damage referred to is clearly a water damage. That provision is as follows:

"It is warranted by the assured, free from damage or injury from dampness, change of flavor or being spotted, discolored, musty or mouldy, except caused by actual contact of sea water with the articles damaged, occasioned by sea perils. In case of partial loss by sea damage to dry

goods, cutlery or other hardware, and on shipments from ports and places East of the Cape of Good Hope, on gunny cloth, gunny bags or hides, the loss shall be ascertained by a separation and sale of the portion only of the contents of the packages so damaged, and not otherwise; and the same practice shall obtain as to all other merchandise, so far as practicable."

I am, of course, aware of the fact that there is a rule of law that in construing policies of this kind they must be liberally interpreted in favor of the insured, that is, rather [fol. 26] strictly interpreted against the insurance company which drew them. I do not mean to say that I disagree with the Corsicana case, because, as just stated, I am not now called upon to apply it. The weight of authority as expressed by the cases cited, which would seem to be contrary, both in England and this country, to the Corsicana decision. But I make this statement merely by way of dictum, because I rest by decision squarely upon the state of facts here, which are different from those in any of the authorities to which I have been referred. In other words, it is not necessary for me to determine whether—were the cancelled rider not before me—by the weight of English or American authority, or both, the cause that is truly proximate, is the one not proximate in time, but proximate in efficiency; or whether, in any event, it must be shown, in order to render defendant liable, that the loss is proximately due to one of the known perils among which retardation or delay of the voyage should not be included.

Summing up my conclusion very briefly, it is this: Where an insurance policy contains broad language, thus affording ground for argument both ways that is that it may or it may not apply to a specific case if the parties are found to have previously covered that specific case by a separate clause, which, however, they later annulled, and for which one of the parties, the insured, had agreed to pay more, then that is very persuasive evidence, if not, indeed, entirely conclusive, that the parties did not intend that such specific case should thereafter be covered by the policy.

Lastly, I find no error in the manner in which the question of this rider was raised. The object of pleadings ought to be to get all questions before the court as promptly as possible, and leave no ground for temporizing pleas or delays at the trial. I find that the ambiguity surrounding

the language of the original policy permitted, in fact called for, a consideration of everything that had gone before. And to raise this rider by a special plea, as is done, I think is entirely consistent with our practice.

I will sign an order in conformity with this opinion overruling the demurrer, the practical effect of which will be to dispose of the entire case.

[fol. 27] IN UNITED STATES DISTRICT COURT

COLLOQUY IN OPEN COURT FOLLOWING DELIVERY OF OPINION BY THE COURT—Filed July 6, 1936

(After the delivery of the opinion, the following occurred).

Mr. Wortche: Is that to both pleas, your Honor?

The Court: Yes. It disposes of the case, does it not?

Mr. Forbes: That is what we want to be perfectly sure about, that there is nothing further for your Honor to conclude, so that in pressing the matter further we will have a complete record. I think you disposed of everything in your opinion.

The Court: That is my understanding. That is what I intended to do.

Mr. Forbes: And that is what I think has been done.

The Court: Is there any difference of opinion, as to that?

Mr. Ober: Technically, they could go ahead on the general issue plea and show there was no such policy, or dispute the facts.

The Court: That is just a duplication of effort.

Mr. Ober: That is all. As a practical matter, is disposes of it. Whether they appeal or whether they elect to try the issues, that won't help them any.

Mr. Forbes: Oh, no. My present attitude would be unquestionably to take an appeal and settle the matter. It seems to me it would be very idle to go into the trial of the case in view of your Honor's decision on this point. I think we would be wasting the Court's time and ours, too.

[fol. 28] The Court: My whole idea has been to settle the entire thing here.

Mr. Wortche: I assume, if we went to trial with the case and this rider was put in evidence, which your Honor un-

questionably would let in, you would grant a prayer taking the case from the jury, would you not?

The Court: Yes. You can have an opportunity to file a stipulation with any additional pleading which will put the matter in proper shape to take an appeal. That can be a matter of understanding between the parties. As far as the Court is concerned, I understand the matter is conclusive.

(Hearing closed.)

IN UNITED STATES DISTRICT COURT

At Law. No. 5801

LANASA FRUIT STEAMSHIP AND IMPORTING COMPANY, INC.,

vs.

UNIVERSAL INSURANCE COMPANY

ORDER OVERRULING DEMURRER TO PLEAS AND DIRECTING ENTRY OF JUDGMENT IN FAVOR OF DEFENDANT—Filed July 25, 1936

The above entitled cause having come on for hearing on the plaintiff's demurrer to the defendant's third and fourth pleas, and the pleadings having been read and considered, and counsel having been heard, and the court having reached the conclusions set forth in an opinion filed herein, that the third plea of the defendant is conclusive of the issue and is an absolute defense to the suit and a replication would be unavailing and unnecessary, and counsel for the plaintiff having stated in open court that they did not desire leave to [fol. 29] reply to said pleas under said conditions it is this 25th day of July, 1936, by the United States District Court for the District of Maryland,

Ordered, Adjudged and Decreed—

1. That the said demurrer be and the same is hereby overruled.

2. That judgment be entered in favor of the defendant with costs.

William C. Coleman, U. S. District Judge.

IN UNITED STATES DISTRICT COURT

DOCKET ENTRY

July 25, 1936. Judgment for the Defendant for costs.

IN UNITED STATES DISTRICT COURT

ASSIGNMENTS OF ERROR—Filed October 14, 1936

Now comes Lanasa Fruit Steamship and Importing Company, Inc., a body corporate, the plaintiff in the above entitled cause, and files the following assignments of error, upon which it will rely upon its prosecution of the appeal allowed in the above entitled cause, from the judgment of this court for the defendant for costs, on the 25th day of July, 1936.

1. The court erred in holding that the "first special plea" (third plea) of the defendant was good.

2. The court erred in not holding the third plea of the defendant sets forth no pleadable defense to the action of the plaintiff herein.

3. The court erred in not holding that the third plea of the defendant pleads as a defense a matter not part of the contract sued on, as appears on the face of the plea.

[fol. 30] 4. The court erred in holding that the rider set up in the defendant's third plea, which was not a part of the policy sued on, is the best and conclusive evidence of the interpretation which must be given to the other clauses of the policy, to wit: an interpretation in favor of the defendant.

5. The court erred in holding that "the perils" of the sea, as set out in the insurance policy sued on, do not cover, nor were they intended to cover, such a situation as is presented in the declaration in this case.

6. The court erred in holding that the broad language of the initial paragraph of the policy sued on was not broad enough, standing by itself, to include liability on the part of the defendant for delay due to stranding.

7. The court erred in not holding that the third and fourth pleas of the defendant did not violate the rules of good pleading, in that they amounted to the general issue plea, and were, therefore, bad.

8. The court erred in overruling the demurrer of the plaintiff to the defendant's third and fourth pleas.

9. The court erred in entering an order overruling the demurrer of the plaintiff to the defendant's third and fourth pleas.

10. The court erred in not entering an order sustaining the plaintiff's demurrer to the defendant's third and fourth pleas.

11. The court erred in entering a final judgment against the plaintiff on the pleadings.

12. The court erred in entering a judgment for the defendant for costs.

Wherefore, the said plaintiff aforesaid, prays that the said judgment of July 25th, 1936, may be reversed and set aside, and the case remanded to the District Court for further proceedings.

George Forbes, Henry L. Wortche, Attorneys for Plaintiff.

[fol. 31] IN UNITED STATES DISTRICT COURT

STIPULATION AS TO MAKING UP TRANSCRIPT OF RECORD—
Filed October 14, 1936

It is stipulated and agreed by and between the counsel for the respective parties to this cause, as follows:

(a) That this cause was originally instituted in the Court of Common Pleas of Baltimore City, and by due procedure properly removed under the Acts of Congress to the District Court of the United States for the District of Maryland, on the ground of diversity of citizenship.

(b) That the transcript of record on plaintiff's appeal to the United States Circuit Court of Appeals for the Fourth Circuit, shall consist of the following:

1. Original Declaration,
2. Pleas of defendant to declaration,

3. Plaintiff's demurrer to defendant's third and fourth pleas,

4. Opinion of the Court overruling demurrer,

5. Proceedings in open court at the time of the rendering of the court's opinion on the demurrer,

6. Order of Court overruling demurrer and directing entry of judgment for defendant for costs,

7. Judgment,

8. Assignments of Error,

9. This Stipulation,

10. Docket Entries,

[fol. 32] 11. Memorandum of the Clerk,

12. Order to Transmit Record,

13. Clerk's Certificate.

It is further stipulated and agreed that the clerk of this court shall make up a transcript of the record in the above styled cause, transmit the same to the Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, Virginia, and be printed in accordance with Rule 23 of that court.

George Forbes, Henry L. Wortche, Attorneys for Plaintiff. Ritchie, Janney, Ober & Williams, Attorneys for Defendant.

IN UNITED STATES DISTRICT COURT

DOCKET ENTRIES

Dec. 7, 1935. Transcript of Record from the Court of Common Pleas of Baltimore City, filed.

Jany. 3, 1936. Pleas 1, 2, 3 & 4, Affidavit, Certificate of Counsel and Exhibit "A", filed (Service admitted). Rule Rep.

Jany. 7, 1936. Joinder of Issue on 1st and 2nd Pleas and demurrer to 3rd & 4th pleas, filed (Service admitted).

June 12, 1936. Order of Court overruling demurrer and directing clerk to enter judgment for the defendant for costs, filed.

June 12, 1936. Judgment for the defendant for costs.

July 25, 1936. Petition of Universal Insurance Company and Order of Court rescinding and striking out order of court entered herein June 12, 1936, filed.

[fol. 33] July 25, 1936. Order of Court overruling the demurrer herein and directing entry of judgment in favor of the defendant with costs, filed.

July 25, 1936. Judgment for the defendant with costs.

Oct. 14, 1936. Petition of plaintiff for allowance of an appeal to the U. S. Cir. Ct. of Appeals and Order of Court allowing the appeal as prayed, and fixing the penalty of the appeal bond at $300 filed.

Oct. 14, 1936. Assignment of Errors filed.

Oct. 14, 1936. Appeal bond approved and filed.

Oct. 14, 1936. Citation issued retble. within forty days. (Service acknowledged.)

Oct. 14, 1936. Stipulation of counsel as to making up transcript of record on appeal filed.

Oct. 29, 1936. Stipulation of counsel in re record on appeal, filed.

IN UNITED STATES DISTRICT COURT

MEMORANDUM OF THE CLERK RE APPEAL PAPERS

(1) Petition for Appeal filed October 14th, 1936.

(2) Appeal Granted, October 14th, 1936.

(3) Appeal Bond, dated October 14th, 1936.

Obligors: Lanasa Fruit Steamship and Importing Company, Inc., as Principal, and the Fidelity and Deposit Company of Maryland, as Surety. Penalty $300.00. Conditioned for costs.

(4) Citation, dated October 14th, 1936. (Service acknowledged October 14th, 1936.

[fol. 34] IN UNITED STATES DISTRICT COURT

ORDER TO TRANSMIT RECORD

And thereupon, it is Ordered by the Court here, that a transcript of the record and proceedings of the cause aforesaid, together with all things thereunto relating, be transmitted to the said United States Circuit Court of Appeals for the Fourth Circuit, and the same is transmitted accordingly.

Teste:

Arthur L. Spamer, Clerk.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 35] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 4136

LANASA FRUIT STEAMSHIP AND IMPORTING COMPANY, INC., a Body Corporate, Appellant,

versus

UNIVERSAL INSURANCE COMPANY, a Body Corporate, Appellee

Appeal from the District Court of the United States for the District of Maryland, at Baltimore

DOCKET ENTRIES

November 21, 1936. The transcript of record is filed and the cause docketed.

Same day, the original petition for appeal, order allowing appeal, bond, and citation are certified up under section 7 of Rule 14.

Same day, the appearance of George Forbes is entered for the appellant.

November 24, 1936. The appearance of Henry L. Wortche is entered for the appellant.

Same day, the appearance of Frank B. Ober and Southgate L. Morison is entered for the appellee.

December 9, 1936. Twenty-five copies of the printed record are filed.

[fol. 36] Argument of Cause

January 11, 1937. (January term, 1937) cause came on to be heard before Parker, Northcott and Soper, Circuit Judges, and is argued by counsel and submitted.

IN UNITED STATES CIRCUIT COURT OF APPEALS FOURTH CIRCUIT

No. 4136

LANASA FRUIT STEAMSHIP AND IMPORTING COMPANY, INC., a Body Corporate, Appellant,

versus

UNIVERSAL INSURANCE COMPANY, a Body Corporate, Appellee

Appeal from the District Court of the United States for the District of Maryland, at Baltimore

(Argued January 11, 1937. Decided April 6, 1937)

Before Parker, Northcott and Soper, Circuit Judges

George Forbes and Henry L. Wortche for Appellant, and Southgate L. Morison and Frank B. Ober (Bigham, Englar, Jones & Houston; Martin Detels, and Ritchie, Janney, Ober & Williams on brief) for Appellee.

OPINION—Filed April 6, 1937

[fol. 37] PARKER, Circuit Judge:

This is an appeal from a judgment for the defendant in an action on a policy of marine insurance. The declaration set forth the policy and alleged the loss of a cargo of bananas as covered thereby. Defendant filed four pleas, the first two pleading the general issue, and the others being special pleas which set up as precluding the right of recovery one of the clauses of the policy and the cancellation of a certain rider which had been attached thereto. Plaintiff demurred to the special pleas and upon the hearing of the demurrer conceded that its right to recover depended upon the court's construction of the policy. The court, after overruling the demurrer as to one of the pleas and sustaining it as to the other, entered judgment for the defendant on the pleadings; and the defendant has appealed from that judgment. The facts disclosed by the pleadings are as follows:

On June 23, 1933, the Universal Insurance Company issued to the Lanasa Fruit Steamship and Importing Com-

pany a floating policy of marine insurance, covering in the sum of $35,000.00 shipments of fruit from the West Indies to the United States. For this policy a premium of 25 cents on the $100.00 of risk was charged. The general coverage clause [1] embraced perils of the seas; but a subsequent clause limited liability with respect to fruits and "other articles that are perishable in their own nature" to cases involving total loss or general average.[2] [fol. 38] This was modified by rider containing provisions with respect to fruit which provided coverage for particular average, or partial loss, in case of stranding.[3]

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[1] Touching the adventures and perils which the said Universal Insurance Company is contented to bear, and take upon itself, in this voyage, they are of the seas, men-of-war, fires, enemies, pirates, rovers, assailing thieves, jettisons, letters of mart and countermart, reprisals, takings at sea, arrests, restraints and detainments of all kings, princes, or people, of what nation, condition or quality soever, barratry of the Master and Mariners, and all other perils, losses and misfortunes, that have or shall come to the hurt, detriment or damage of the said goods and merchandises, or any part thereof.

[2] It is also agreed that bar, bundle, rod, hoop and sheet iron, wire of all kinds, tin plates, steel, madder, sumac, wickerware and willow (manufactured or otherwise), salt, grain of all kinds, tobacco, Indian Meal, fruits (whether preserved or otherwise), cheese, dry fish, hay, vegetables and roots, rags, hempen yarn, bags, cotton bagging and other articles used for bags and bagging, pleasure carriages, household furniture, skins and hides, musical instruments, looking glasses, and all other articles that are perishable in their own nature, are warranted by the assured free from average, unless general; * * *.

[3] Special conditions under deck: Warranted free from particular average unless the vessel or craft be stranded, sunk, burnt, but the assurers are to pay the insured value of any package or packages which may be totally lost in loading transshipment or discharge, also any loss of or damage to the interest insured which may reasonably be attributed to fire, collision or contact of the vessel and/or craft and/or conveyances with any external substance (ice included) other than water, or to discharge of cargo at a

On April 4, 1934, for an additional premium of 35 cents, the company added a rider to the policy providing that it should be free of particular average unless the vessel were stranded, sunk, burned, on fire or in collision, in any of which events there should be liability "for such loss by decay, injury or damage to the fruit as is occasioned thereby or occurs during or in consequence of delay resulting therefrom".[4] On June 25, 1935 this rider was cancelled and the rate on the policy was reduced from 60 cents to 25 cents.

In July 1935 the Norwegian Steamship Smaragd, loaded with bananas belonging to plaintiff and covered by the policy sued on, was stranded while coming up Chesapeake Bay. Before she could be floated, the bananas became over- [fol. 39] ripe and rotted, resulting in a total loss of the cargo; and this action has been instituted to recover under the policy for the loss sustained. The only question in the case is whether this loss is covered by the policy. The contention of plaintiff is that it is covered since it resulted from stranding which, as a peril of the seas, is embraced in the coverage. The contention of the defendant is that it is not covered as it resulted, not from stranding, but from delay incident thereto and that the intention that loss resulting from such delay should not be covered is shown

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port of distress, also to pay landing, warehousing, forwarding and special charges, if incurred. * * * Shipments on deck to be insured: Free of particular average unless caused by the vessel being stranded, sunk, burnt, on fire, or in collision, but including jettison and/or washing overboard, irrespective of percentage.

[4] The whole of the clause is as follows: Free of particular average unless the vessel be stranded, sunk, burned, on fire or in collision, if any, all or several of which events the insurers are liable for such loss by decay, injury or damage to the fruit as is occasioned thereby or occurs during or in consequence of delay resulting therefrom. Insurers are liable also for such loss in consequence of delay resulting from any, all or several of the following causes; i. e. breakage of shaft, loss of blades from propeller, derangement or breakage of machinery, derangement or breakage of rudder and/or sternpost, whether or not the vessel be stranded, sunk, burned, or in collision, provided that in all cases the loss amounts to 10% after deducting 5% for ordinary loss.

by the act of the parties in affixing and subsequently cancelling the rider relating to loss from delay. The judge below based his decision for defendant upon the presumed intention of the parties as evidenced by their conduct in affixing and cancelling this rider.

There can be no doubt but that stranding is one of the marine perils covered by the policy. Richelieu etc. Nav. Co. v. Boston Marine Ins. Co. 136 U. S. 408, 421; Liverpool Steam Co. v. Phenix Ins. Co. 129 U. S. 397, 438. And this is expressly recognized in the quoted warranties against particular average in which loss from stranding is excepted. The question, however, is not whether the policy covers loss and damage due to stranding, but whether it covers damage due to the decay of cargo where stranding did not cause the decay but merely the delay in voyage which was the occasion for the decay resulting from the inherent nature of the cargo. This question is to be answered, not in the light of the logic which courts might employ in dealing with such questions as liability of the vessel for negligence in stowage (cf. The Nichoyo Maru, this day decided — Fed. (2d) —), but in the [fol. 40] light of the construction which has been given to "an ancient form of words which have always been taken in a narrow sense." Queen Ins. Co. of America v. Globe & Rutgers Fire Ins. Co. 263 U. S. 487, 493. And the answer is found by the courts in the application of two well settled rules, one that the underwriters take no risk with respect to the retardation of the voyage nor its interruption by the perils insured against (Jordan v. Warren Ins. Co. 1 Story 342, Fed. Cas. No. 7524, 38 C. J. 1097), and the other that the proximate and not the remote cause of the loss is to be considered, the latter rule being applied with greater strictness in the case of marine insurance than in other cases. Arnould on Marine Insurance and Average, 10th ed., vol. 2, sec. 818. The resulting rule is thus stated in 38 C. J. 1097:

"Insurer in general takes no risk with regard to the length or retardation of the voyage by the perils insured against, nor to its interruption, if it is resumed or capable of being resumed; as in the case of an embargo, or where the master is detained in port by a prosecution against him for a supposed violation of law, or where he remains to prosecute a suit for collision, or where a cargo insured is sunk and raised uninjured after considerable delay and is sold for a less price owing to the delay, or where a cargo of meat, fruit, or other

perishable goods is injured by the delay, or a collision causes delay for repairs."

The leading English case dealing with the question is Taylor v. Dunbar 4 L. R., decided in 1869, wherein it was held that there was no liability under a marine policy for damage to meat resulting from delay due to tempestuous weather. Keating, J. said: "The facts stated in the case show beyond a doubt that the proximate cause of the loss of the meat was the delay in the prosecution of the voyage. That delay was occasioned by tempestuous weather; but no case that I am aware of has held that a loss by the unexpected duration of the voyage, though that be caused by perils of [fol. 41] the sea, entitles the assured to recover on a policy like this". Montague Smith, J., said: "To render the underwriter liable, it must be shown that the loss is proximately due to one of the known perils. Retardation or delay of the voyage is not one of them". Brett, J., said: "Such damage must have occurred many times, and yet no trace is to be found of such a claim being maintained. If it be desired, a clause may easily be inserted in the policy to meet the case."

In another English case much cited, Pink v. Fleming 25 L. R. 396, decided by the Court of Queen's Bench in 1890, it was held that there was no liability under such a policy for damage to fruit from delay due to collision. Lord Esher, M. R., said: "It is well setfled that by the law of England there is a distinction in this respect between cases of marine insurance and those of other liabilities. In cases of marine insurance the liability of the underwriters depends upon the proximate cause of the loss. In the case of an action for damages on an ordinary contract, the defendant may be liable for damage, of which the breach is an efficient cause or causa causans; but in cases of marine insurance only the causa proxima can be regarded." Lord Justice Lindley said: "It has long been the settled rule of English law with regard to marine insurance that only the causa proxima or immediate cause of the loss must be regarded. The rule is well known, and people must be taken to have contracted on that footing." Lord Justice Bowen said: "Whether we consider the damage occasioned by the delay or that occasioned by the handling of the fruit, the same principle appears to apply. The proximate cause of the loss was not the collision or any peril of the sea. It was the perishable

character of the articles combined with the handling in the one case and the delay in the other." While Lord Esher used language in his opinion to the effect that the cause last in point of time should be regarded as proximate, which cannot be supported, there has been no question as to the cor-
[fol. 42] rectness of the rule laid down in the language quoted or of its application to cases of this character.

Other English authorities laying down the same rule are Imerson Steamship Co. v. Bischoff 7 L. R. 670, holding that loss of freight resulting from the exercise of a power of mulct or abatement because of delay caused by a peril of the sea, was not covered by the policy, and Totham v. Hodges 6 T. R. 656, holding that death of slaves for lack of provisions due to delay caused by bad weather was not covered. The rule was codified in the Marine Insurance Act of 1906, Sec. 55(2) (b), as follows:

"Unless the policy otherwise provides, the insurer on ship or goods is not liable for any loss proximately caused by delay, although the delay be caused by a peril insured against."

In this country, Taylor v. Dunbar has been followed in Cory v. Boyleston Fire & Marine Ins. Co. 107 Mass. 140, 9 Am. Rep. 14, and in Perry v. Cobb 88 Me. 435, 49 L. R. A. 389. In the first of these cases, in which the opinion was written by Mr. Justice Gray, it was held that there could be no recovery for injury to goods by the ordinary dampness of the hold, though aggravated by the length of the voyage and the variety of the climate through which the vessel has passed in consequence of perils of the sea, "because such injury is still, if those perils do not otherwise operate upon the goods, attributable to the nature of the goods themselves, and not to the perils of the sea, as the proximate and efficient cause." In the second, it was held that there could be no recovery for that part of the damage to a cargo of lime which was attributable to prolongation of the voyage, although this was due to perils of the sea, the court saying: "The general rule is that everything which happens through the inherent vice of the thing, or by the act of the owners, master, or merchant shipper, shall not be reputed a peril, if not otherwise borne on the policy. * * * If the in-
[fol. 43] herent vice be stimulated by a protracted voyage, it is still no loss from a peril of the sea." The same hold-

ing as to decay of perishable goods being attributable to the vice of the goods and not to marine perils causing delay was made in general average cases by Mr. Justice Grier in Bond v. The Superb, 1 Wall. Jr. 355, 3 Fed. Cas. No. 1,624, and by Judge Woolsey in The Casey 39 Fed. (2d) 130 at 138. In the case last cited the learned Judge said: "It may be alleged, as it is in this libel, that the deterioration of the cargo was due to the delay at the port of refuge, but all men know that delay does not cause decay, although it may be the occasion owing to which decay occurs."

It must be conceded that number of American cases have not followed the English rule, a fact to which Lord Esher adverted in Pink v. Fleming, supra. Thus in Williams v. Smith 2 Caines Rep. 1 (N. Y.) it was held that there was liability for deterioration of cargo resulting from delay caused at a port of necessity into which the vessel had been driven and in which she was detained by blockade and pestilence. In Tudor v. New England Ins. Co. 12 Cush. 554, it was held that there was liability for a cargo of ice which was sold at a loss because a vessel was driven by perils of the sea into a port for repairs and the nature of the cargo, which would not permit of delay, made such action necessary. And in the Corsicana 203 N. Y. Supp. 10, aff. per curiam 239 N. Y. 573, 1924 Am. M. C. 365, the principal case upon which plaintiff relies, it was held that there was liability for loss sustained with respect to a cargo of potatoes which had begun to rot as a result of delay when the vessel in which they were being carried was driven into the port of Charleston for repairs. That case, however, while drawing distinctions which it is not necessary here to elaborate, approved the rule that "if the inherent vice of the article shipped is stimulated by a protracted voyage, it is still no loss from a peril of the sea". Magoun v. New England [fol. 44] Marine Ins. Co., 1 Story 157, 16 Fed. Cas. 483, another case upon which plaintiff relies, throws little light on the question before us, as the loss there involved arose out of a restraint by government and the question was as to whether there was a total loss. And Firemen's Fund Ins. Co. v. Frazier Powder Co. (C. C. A. 9th) 253 Fed. 305, involved not a loss due to delay, but liability for a "particular charge" incurred in forwarding cargo of a stranded vessel to its destination, the holding being that the stranding was the proximate cause of the incurring of this extra expense.

Counsel for plaintiff candidly admit that the English rule precludes liability in this case; and, the state of the authorities being what it is in this country and there being no contrary decision by the Supreme Court or any federal court, we feel that the English rule should be followed, as in cases of marine insurance it is highly desirable that our decisions be kept in harmony with those of England, "the great field of this business." Queen Ins. Co. of America v. Globe & Rutgers Fire Ins. Co. 263 U. S. 487, 493; The Eliza Lines 199 U. S. 119, 128; Aetna Ins. Co. v. Houston Oil & Transport Co. (C. C. A. 5th) 49 Fed. (2d) 121, 124; New York & Oriental S. S. Co. v. Automobile Ins. Co. (C. C. A. 2d) 37 Fed. (2d) 461, 463. Plaintiff argues that the decisions of the New York courts should be followed in interpreting the contract because it was made in that state. Assuming the fact to be as stated, although this does not clearly appear from the record, the conclusion does not follow; for it is well settled that, in the interpretation of contracts of insurance the federal courts, in the absence of statute, follow the general law and are not bound by state decisions. Washburn & Moen Mfg. Co. v. Reliance Ins. Co. 179 U. S. 1; Aetna Life Ins. Co. v. Moore 231 U. S. 543, 559; New York Life Inc. Co. v. Yerys (C. C. A. 4th) 80 Fed. (2d) 264, 265; Walters v. Mutual Life Ins. Co. (C. C. A. 4th) 64 Fed. (2d) 148; Niagara Fire Ins. Co. v. Raleigh Hardware Co. (C. C. A. 4th) 62 Fed. (2d) 705; Fountain & Herrington [fol. 45] v. Mutual Life Ins. Co. (C. C. A. 4th) 55 Fed. (2d) 120, 124; Aetna Ins. Co. v. Houston Oil & Transport Co. (C. C. A. 5th) 49 Fed. (2d) 121, 124; Hawkeye Com. Men's Ass'n v. Christy (C. C. A. 8th) 204 Fed. 208, 211; Travelers Ins. Co. v. Thom (C. C. A. 1st) 180 Fed. 82; McKelvie v. Mutual Benefit Life Ins. Co. (C. C. A. 2d) 287 Fed. 660. In the case first cited, which involved a policy of marine insurance executed in Massachusetts, the Supreme Court, speaking through Chief Justice Fuller, said:

"It is said that a different rule has been laid down in Massachusetts by the Supreme Judicial Court of that commonwealth. Kettell v. Alliance Ins. Co., 10 Gray, 144; Mayo v. India Mut. Ins. Co., 152 Mass. 172. Even if this were absolutely so we should not feel constrained, though regretting the difference of opinion, to depart from our own rule. The policy was a Massachusetts contract, it is true, but its construction depended on questions of general com-

mercial law, in respect of which the courts of the United States are at liberty to exercise their own judgment and are not bound to accept the state decisions as in matters of purely local law."

The fact that the rider, subsequently cancelled, covering loss and damage from delay was affixed to the policy shows that the parties placed the same interpretation upon the general coverage clause of the policy which we have placed upon it, and that plaintiff was willing to pay an additional premium greater than the original premium for protection against such loss and damage. Plaintiff argues that the rider embraced causes for delay in addition to the marine perils against which the policy insured. This is true, but the fact that the rider covered also loss due to delay from those perils is strong proof that the parties did not interpret the policy without the rider as covering such loss. The argument, advanced at the hearing, that the rider was to cover partial loss is without point since under the policy without the rider plaintiff was insured against partial loss as well as against total loss caused by stranding, but, as we have [fol. 46] seen, not against loss from delay incident to stranding. If, therefore, we thought there were any doubt as to the interpretation to be placed upon the policy, we should think, as did the judge below, that the construction which the parties themselves placed upon it would determine the question involved against plaintiff's contention. Insurance Co. v. Dutcher 95 U. S. 269, 273; Williston on Contracts, Sec. 623.

We agree with the lower court that the clause* of the policy relied on by the fourth special plea has nothing to do with the case. Cory v. Boyleston Ins. Co., supra, 107 Mass. 140, 9 Am. Rep. 14, 19.

For the reasons stated, the judgment for defendant will be affirmed.

Affirmed.

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* That clause is as follows: "It is warranted by the assured, free from damage or injury from dampness, change of flavor or being spotted, discolored, musty or mouldy, except caused by actual contact of sea water with the articles damaged, occasioned by sea perils."

IN THE UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 4136

LANASA FRUIT STEAMSHIP AND IMPORTING COMPANY, INC., a Body Corporate, Appellant

vs.

UNIVERSAL INSURANCE COMPANY, a Body Corporate, Appellee

JUDGMENT—Filed and Entered April 6, 1937

[fol. 47] Appeal from the District Court of the United States for the District of Maryland

This Cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Maryland, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed with costs.

John J. Parker, Senior Circuit Judge.

April 6th, 1937.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 48] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 11, 1937

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Black took no part in the consideration and decision of this application.

Endorsed on cover: File No. 41,523. U. S. Circuit Court of Appeals, Fourth Circuit. Term No. 57. Lanasa Fruit Steamship and Importing Company, Inc., petitioner, vs. Universal Insurance Company. Petition for writ of certiorari and exhibit thereto. Filed May 12, 1937. Term No. 57, O. T., 1937.

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